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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ADAMS DAIRY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on September 8, 1965.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 20-35) is reported at 350 F. 2d 108. Its prior opinion is reported at 322 F. 2d 553. The order of this Court vacating the court of appeals' prior judgment is reported at 379 U.S. 644. The findings of

fact, conclusions of law, and order of the Board (R. 2-28)[1] are reported at 137 NLRB 815.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1965 (Appendix A, *infra*, pp. 36-37). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether an employer violates his duty to bargain under the National Labor Relations Act when, because of economic considerations, he changes the method of distributing his products by substituting independent contractors for his own employees, without first bargaining about that decision with the union representing his employees.

2. If the first question is answered affirmatively, whether, as a remedy for the unlawful refusal to bargain, the Board may properly order the employer, *inter alia*, to offer the displaced employees reinstatement with back pay.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 38-40.

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[1] "R." refers to the printed record in the court of appeals. References preceding a semicolon are to the Board's findings; those following it are to the supporting evidence.

STATEMENT

A. The Board's Findings of Fact

The Company processes and sells milk and other dairy products exclusively to retail outlets; about 80 percent of its sales are made to the A & P and Kroger grocery chains (R. 9; 41, 100-101). Prior to February 1960, these sales were made through the use of both driver-salesmen employees of the Company and independent contractors. There were 24 driver-salesmen, who were utilized largely in the City and County of St. Louis, Missouri, and 10 independent contractors, who serviced the outlying area in Missouri and across the river in Illinois (R. 9-10; 55-56, 75-76, 92). The independent contractors bought the products from the Company at its plant and then resold them to the retailers, whereas the driver-salesmen were paid a commission on each unit they sold, with a guaranteed minimum salary (R. 10; 123). Since 1954, the driver-salesmen were represented by an independent union, the Independent Wholesale Dairy Products Salesmen Association ("the Union"), which had been certified by the Board; the Company's "inside" employees were represented by Teamsters Local 503 (R. 9).

In August 1959, the Company and the Union negotiated a new three-year contract. During the negotiations, the Union orally proposed that the existing routes of the driver-salesmen be defined and that the use of independent distributors therein be barred

(R. 11; 83, 87-88, 104-107).[2] The Company refused the Union's demand. At no time in the negotiations, however, did the Company suggest that it contemplated changing its method of distribution so as to replace all its driver-salesmen with independent distributors, nor did any language in the contract as ultimately adopted vest it with complete discretion in that regard (R. 11; 40-41, 42-43, 87-88, 105-107).[3]

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[2] Since the driver-salesmen were paid a commission based on their sales volume, any sales by the Company to independent contractors in areas serviced by the driver-salesmen would reduce the latter's compensation. In an effort to protect the driver-salesmen against this danger, the Union, in 1954, had sought a similar provision, and in 1956, a provision requiring that driver-salesmen be paid a commission on sales to independent contractors. The Company had refused both provisions. (R. 10; 44-46, 73, 103-104, 139.)

In addition, the record shows the following: In 1957, the Company unilaterally allocated part of a route serviced by one of its driver-salesmen to an independent distributor. The allocated part of the route involved an area in Illinois, a territory which fell outside the area normally serviced by the driver-salesmen. Accordingly, the Union, after consultation with the driver-salesman affected, decided not to press the matter. In 1955, General Manager Adams talked to the driver-salesmen about converting to independent distributors, but they rejected the proposal. In 1958, Adams offered driver-salesman Powell an independent distributorship when, after suffering a heart attack, Powell had asked for a helper. (R. 13, n. 5, 18, n. 9; 74-75, 92.)

[3] Article VII of the agreement in relevant part provides that nothing contained therein "shall prevent Employer from enlarging, decreasing or altering the specified territory of any route nor shall the same prevent Employer from putting on, splitting, rearranging, consolidating or eliminating any route or routes * * *" (R. 118). The context of the provision makes plain that it was merely intended to give the Company flexi-

The Company merely complained of growing competition; observed that Quality of O'Fallon, a small rival dairy which employed independent distributors, had lower delivery costs; and suggested that it would like to have delivery costs comparable to O'Fallon's (R. 11; 35-36, 48, 50, 81-82, 87-88).[4] The parties reached agreement when the Union demonstrated that its wage proposals were lower than wage contracts obtained by Teamsters Local 603 from rival dairies in the St. Louis area (R. 11; 36-37, 42, 48-49, 112-113).

In November 1959, when the contract was in its third month, the Company initiated a new series of meetings with the Union, which were held in November and December (R. 11; 38, 49, 89). It again complained, as it had in the recent contract negotiations, that it was being hurt by competition (R. 11-12; 38, 49-51, 81). The Company also advised the Union that in conjunction with other dairies it was considering a merchandising plan, but declined to give the details (R. 11-12; 39, 51-52, 81). The Union expressed its willingness to consider any Company pro-

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bility in assigning work to the driver-salesmen, and did not cover contracting out all of their work (see also Article XII, R. 120).

[4] As the Board observed (R. 11), the emphasis was on O'Fallon's delivery costs, not on its method of achieving them. According to the Company, O'Fallon's costs were ¾ cents a "point" while the Company hoped to reduce its cost to 1 cent a point (R. 35-36, 81-82). A "point" is a common denominator for various delivery items; one point may be one quart of milk, two pints of milk, one-half pint of cream, one container of cheese, etc. (R. 125-126).

posals for lowering costs, but the Company made no specific requests (R. 12; 40, 52-53, 82, 89). Again the Company did not suggest that it was contemplating a change to independent contractors, nor did it offer independent distributorships to the employees, either directly or through the Union (R. 12; 40-43).

On February 9, 1960, driver-salesman Stanley Doe began loading his truck but was told not to go out (R. 13; 58-59). General Manager Adams told Doe that his route had been taken over by Adams' nephew as an independent distributor (R. 13; 59-61). Adams assured Doe that nothing personal was involved, that the Company would later split some of the larger routes and provide a new one for Doe, and that meanwhile he would be retained to deliver special orders (R. 13; 62). The next day the Union filed an unfair labor practice charge with the Board, alleging that the Company's action with respect to Doe constituted a refusal to bargain (R. 13; 61, 108-109). A few days later, on February 13, Sales Manager Scott took driver-salesman Powell into a back room to advise him that the Company had postponed for a week putting independent distributors on all the routes (R. 13; 66-67).

On February 22, after the drivers had finished their routes, General Manager Adams arranged a meeting at a local restaurant with Union President Bridge and Treasurer Hartshorn (R. 13; 76-77, 90). After some general conversation, Adams told the Union representatives to notify their members to check with the supervisors before going out "to see if any store had been eliminated from their route" (R. 13-

14; 77, 89-90). When Bridge asked for details, Adams said that he had "other people who were interested in buying milk from Adams Dairy and reselling it," and that it might be the present independent distributors or it might be anybody (R. 14; 77, 90). Adams assured Bridge that no driver-salesman would be laid off and that no complete route would be taken off, since only deliveries on some routes would be affected (R. 14; 78-80). Bridge objected that the Company "was taking away work that [the Union] had bargained for," and reminded Adams of the pending charge based on the change in Doe's route (R. 14; 78).

When Adams met with the Union representatives, he had already made tentative arrangements with four independent distributors to buy Company trucks and to service customers previously handled by driver-salesmen (R. 14; 90-91, 95, 97-98). Another six prospective distributors were waiting for Adams at the Company's office and he returned from the restaurant meeting to complete arrangements with them (R. 14; 90-91, 95). That night, between the normal quitting time and 11:00 p.m., the ten new distributors loaded their trucks to make deliveries the following morning (R. 14; 84-85, 91).

When the driver-salesmen arrived for work the next morning, they found that all their routes were being serviced by independent distributors (R. 15; 75, 79-80). The following day, the Company met with the Union and advised that it had changed its method of operation and that all the drivers were discharged (R. 15; 75-76, 80-81). Doe, who had been told that

he would remain as a special driver until a new route was provided for him, was included in the discharge (R. 15; 62).

The independent distributors used the same trucks as the Company's driver-salesmen had used, having purchased them from the Company. The trucks continued to bear the Adams scotch plaid design, but the name and address of the individual distributor was added (R. 85, 98-99). Although the agreement between the Company and each distributor gave the latter sufficient latitude over such matters as resale price, the selection of drivers, and the use of helpers to make him an independent contractor rather than an employee of the Company (see R. 14, n. 7), it nevertheless retained for the Company substantial controls over the distribution operation.[5] The dis-

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[5] Under the agreement (which was introduced in evidence, R. 98, Charging Party's Exhibit No. 1), the Company had "the sole right to allocate districts to insure competitive parity and safeguard the maintenance of high standards of service to present and prospective consumers of the [Company's] products" (par. 2). The Company required the distributor to maintain the delivery truck in a sanitary condition, to keep the products at proper temperatures, to store properly damaged or defective containers of dairy products until redelivery to the Company, to keep the crates and other equipment used in good condition, to use only employees who were in good health and neat in appearance, and to maintain courteous and salesmanlike relations with customers. The Company was the sole judge whether these standards were complied with, and non-compliance was a ground for terminating the agreement (par. 3). In order "to safeguard and insure against dairy products reaching consumers in a condition below the standards desired by the [Company], and which might result in irreparable damage to [its] business," the Company agreed

tribution pattern of the independent distributors was essentially the same as that of the driver-salesmen. After the change, about 80 percent of the Company's milk products continued to be delivered to Kroger and A & P stores (R. 100-101).

B. The Board's Decision and Order

The Board held (R. 3) that, by engaging independent distributors to take over the work of the driver-salesmen without prior notice to or consultation with the Union, the Company violated Sections 8(a)(5) and (1) of the Act. The Board rejected the Company's contention that either the Union had waived its right to be consulted or that the parties had bargained to an impasse on the issue of subcontracting. The Board found that, although in the contract negotiations the Union had sought to limit the Company's freedom to make inroads on the driver-salesmen's routes, the Company and the Union had never specifically faced the problem of a total cessation of the Company's delivery activities (R. 17-20).

The Board's order (R. 4-7) requires the Company to cease the unfair labor practice found; to bargain

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"to re-purchase at the same rates, and prices all merchandise such as leakers, or damaged products returned to the plant" (par. 5). Although the distributor owned the truck and it could bear his name, the truck was to be painted in colors uniform with those of the trucks of other independent contractors doing business with the Company, and the Company reserved the right to paint and repaint the trucks as it deemed necessary (par. 6). The distributor agreed to furnish the Company with a list of customers to whom he sold dairy products and to keep such list up to date as changes were made (par. 9).

upon request concerning the contracting out of its delivery activities; to offer the driver-salesmen reinstatement to their former positions; to repay them for earnings lost as a result of the unfair labor practice; and to post the customary notice.

C. The Court of Appeals Decisions

In its first decision, the court of appeals concluded that, since the Company's decision to change over to an independent contractor system of distribution was motivated by economic rather than anti-union considerations, the Company was not obligated to bargain about that decision. However, the court held that the Company was required, but had failed, to negotiate about the treatment of the employees who were terminated by its decision. As a remedy for this limited violation of Section 8(a)(5) of the Act, the court, using Article XII of the collective bargaining agreement as a guide, modified the Board's order to provide that the driver-salesmen receive the difference between the one-week's pay given them by the Company and the four months' pay allowed by Article XII.[6] 322 F. 2d 553.

The Board petitioned for a writ of certiorari, and this Court (379 U.S. 644) granted the petition, vacated the judgment, and remanded the case for reconsideration in the light of the intervening decision

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[6] Article XII (R. 120-121), which implements Article VII (n. 3, p. 4, *supra*), provides that when milk routes are split, rearranged, or consolidated, drivers whose sales are reduced as a result thereof are entitled to full base pay and commissions for four months after the change.

in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203. The court of appeals, after such reconsideration, adhered to its original conclusion that the Company was not obligated to bargain about its decision to change to an independent contractor system of distribution, but was only required to consult the Union about the effects of that decision. It accordingly reentered its original remedial order (App. A, *infra*, pp. 20-35).

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals that the National Labor Relations Act did not require respondent to bargain with the union representing its driver-salesmen before it substituted independent contractors for them as the personnel to distribute its products misapplies the rationale of this Court's decision in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, and presents an important question respecting an employer's statutory duty to bargain about contracting out which this Court should decide.

1. (a) In *Fibreboard*, the employer contracted out plant maintenance work which his employees had previously been doing to an independent contractor, who undertook to perform the same work with a different set of employees. The Court pointed out that the contracting out of work performed by the members of the bargaining unit was "well within the literal meaning of the phrase 'terms and conditions of employment,'" as used in Section 8(d) of the Act; that the situation

was not unlike that in *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, "where we held that conditions imposed upon contracting out work to prevent possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit constituted a statutory subject of collective bargaining"; [7] that the "Company's decision to contract out the maintenance work did not alter the Company's basic operation," since "the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment"; and that the factors which prompted the Company's decision to contract out—*i.e.*, a desire to reduce the high cost of its maintenance operation—had "long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework" (379 U.S. at 210, 212, 213-214). On the basis of these considerations, the Court concluded that the type of contracting out involved in *Fibreboard* was a statutory subject of collective bargaining under Section 8(d) of the Act.

The same factors are present here. As in *Fibreboard*, employees have been deprived of all the work which they had been performing, and were still

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[7] In *Oliver*, the union and the motor carriers included in their collective bargaining agreement a provision which fixed the minimum rental to be paid by the carrier when he leased vehicles to be driven by *their owners*, rather than the carriers' own employees. The Court held that the provision was designed to protect the basic wage structure established under the collective agreement. It was thus a mandatory bargaining subject under the federal labor laws and could not be regulated under State antitrust laws. 358 U.S. 283, 294-295.

willing to do, merely because their employer believed that a "contractor" would be able to do it cheaper. To be sure, the employees here have been replaced by individual independent contractors rather than by employees of a single independent contractor, but the Court's reliance on *Oliver*, *supra*, indicates that this factual distinction is irrelevant.

The independent contractors performed the same work as the Company's former employees, the Company still required that work, and the conditions of its performance were not, in any meaningful sense, different from those which existed before the contracting out. Both before and after the contracting out, the Company sold the bulk of its milk to retail stores, and needed to transport the milk to them. The Company did not discharge its driver-salesmen until it had obtained the requisite number of independent contractors, and these contractors were bound by detailed stipulations which insured that deliveries would continue as before and that the Company's interests in proper sanitation, efficiency, and good customer-relations would be protected. After the changeover, the independent contractors used the same trucks (though now owned by them), painted substantially the same as before, to provide the Company with the same service formerly provided by members of the bargaining unit—*i.e.*, about 80 percent of the Company's milk continued to be delivered to Kroger and A & P stores. (*Supra*, pp. 7-9.)

(b) The factors relied on by the court below afford no basis for distinguishing *Fibreboard*.

(i) The court emphasized that the Company had sold its trucks to the independent distributors, that they took title to the products at the plant, and that thereafter the Company was not "legally" concerned with the products or whether the distributor sustained a profit or loss. The court concluded that, in these circumstances, "there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment," and that, to require bargaining about such a decision, "would significantly abridge [the Company's] freedom to manage its own affairs." (App. A, *infra*, p. 26.)

The court of appeals thus regarded this case as falling within the caveat expressed in the concurring opinion in *Fibreboard*—that decisions "concerning the commitment of investment capital and the basic scope of the enterprise," which lie "at the core of entrepreneurial control," are not within the area of mandatory bargaining (379 U.S. at 223). Apart from the fact that this was the view of only three members of the Court, the Company's action does not fall in that category. Although the Company liquidated part of its capital in the sense that it sold its trucks, the Company did not thereby terminate any part of its business. The Company continued to have its products distributed as formerly; it merely adopted a new method of distribution designed to reduce costs. Thus, just as in *Fibreboard*, the employer merely substituted one set of employees for another to do the same work (which was still needed in his operation), and the decision to do so turned upon the kind of cost considera-

tions which directly concern the interests of the employees and are amenable to collective bargaining. The court below therefore erred in concluding that the principle of *Fibreboard* was inapplicable here, and that the Company's action fell outside the area of mandatory bargaining under the Act.

(ii) Nor does *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263, support the decision of the court below (see App. A, *infra*, pp. 27-30). This Court there held that an employer did not violate Section 8(a)(3) of the Act by permanently closing a part of his business, even if he was motivated by anti-union considerations, unless the "purpose and effect" of such action was to "chill unionism" in any of his other plants. But the Court did not decide whether, where such a partial closing of a business is permissible, the employer still may first have to bargain with the union about taking such action (see 380 U.S. at 267, n. 5). In any event, for the reasons given above, the respondent's change in its method of distribution cannot realistically be viewed as a partial "going out of business."

(iii) Finally, *Fibreboard* cannot be distinguished on the ground that here, unlike there, the Union had in effect bargained away its right to be consulted about the creation of independent distributorships. Although the court below discussed this matter at some length, it merely concluded that "it is arguable that such bargaining actually took place," and that "[t]he facts yield the implication that, in fact, such negotiation [about independent distributorships] had taken place" (App. A, *infra*, p. 30). This is

hardly sufficient to override the contrary finding of the Board (R. 11, 18) that neither in the contract nor in the prior negotiations had the parties addressed themselves to the problem of a total abandonment of the driver-salesman system. Moreover, since that finding rests on ample evidence, it would have been error to disturb it.[8]

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[8] It is well settled that "waiver" of a statutory right, like that here, must be clearly and unmistakably established. See *National Labor Relations Board* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475, 477 (C.A. 5); *The Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 750-751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488 (C.A. 1): What occurred here fell far short of that requirement.

Thus, in the 1959 contract negotiations, the Union orally proposed that the existing routes of the driver-salesmen be "frozen" and the Company rejected the proposal. Since the Company had never suggested that it contemplated a total abandonment of the driver-salesman system, this proposal, like the other similar proposals in the two prior contract negotiations, was merely addressed to the more limited problem of the driver-salesmen losing commissions as a result of some sales to "outsiders" in their territory (see n. 2, p. 4, *supra*). In any event, the Company's mere rejection of the proposal is not sufficient to establish that the Union had "waived" its statutory right to bargain about the creation of independent distributorships; at best, it shows only that the Union failed to get an additional contract right to supplement its statutory right. See *The Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971; *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1413-1414.

Nor did Article VII of the 1959 contract (n. 3, p. 4, *supra*) empower the Company unilaterally to abandon its driver-salesmen system. The context of the provision makes plain that it was merely intended to give the Company flexi-

2. We thus conclude that the rationale of *Fibreboard* also covers the present case, and that the distinctions made by the court of appeals are unsound. Cf. the recent ruling by the Court of Appeals for the Fifth Circuit in *National Labor Relations Board* v. *American Manufacturing Co.*, 351 F. 2d 74, that "the decision to subcontract work is a subject for mandatory bargaining. Any doubt which may have existed was put to rest by Fibreboard * * *" (*id.* at 80).[9] We recognize, however, that in *Fibreboard* the Court stressed that it was deciding only that the employer had the duty to bargain about the particular type of contracting out

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bility to adjust the work load of the driver-salesmen—*i.e.*, the Company could split a route when the volume of business became too great, and consolidate routes when volume declined.

Finally, the Company did not discuss the creation of independent distributorships with the Union in its meetings in November and December 1959. The Company merely complained of high costs, advised that it was considering a merchandising plan with other dairies, and declined to give details or to offer any concrete cost proposal, despite the Union's expressed willingness to consider such proposals. And, in February 1960, when the Company decided to engage independent distributors, it concealed its true intentions from the Union until the change was accomplished. (*Supra*, pp. 5-7.)

[9] There, as here, the employer, without first bargaining with the union, discontinued the trucking phase of his business and sold his trucks to independent contractors who continued to deliver the employer's product. The court sustained the Board's finding that, since the employer was discriminatorily motivated, his action violated Section 8(a)(3) of the Act. The court further found that, independent of the illegal motivation, the action violated Section 8(a)(5).

there involved. See 379 U.S. at 209, 215, and the concurring opinion, pp. 218, 224. In these circumstances, it is appropriate that this Court should further define the scope of the duty of employers to bargain collectively with respect to contracting out. Since the type of contracting out involved here is common in the wholesale and retail trades, it is important to the administration of the Act that the applicability of the bargaining requirements of the Act to such activity be definitively resolved.

3. The Board's order (R. 5) requires the Company to offer all of the driver-salesmen who were displaced in February 1960 reinstatement to their former or equivalent positions, to reimburse them for any earnings lost as a result of their displacement, and to bargain upon request with the Union concerning the utilization of independent distributors. This order—which is identical to the one which this Court sustained in *Fibreboard* (379 U.S. at 215-217)—is well within the Board's remedial authority under Section 10(c) of the Act, since it merely restores the *status quo ante* the unfair labor practices. See *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194. Here, as in *Fibreboard*, the Board was entitled to find, as it did, that, unless the driver-salesmen were reinstated to their former positions and reimbursed for their lost earnings, there could be no meaningful bargaining about establishing independent distributors.[10]

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[10] The court of appeals noted (App. A, *infra*, p. 35) that counsel had stated that the respondent "completely terminated all of its activities as of December 30, 1963 * * *." The

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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National Labor Relations Board.

DECEMBER, 1965.

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circumstances surrounding such termination, and the appropriateness of possible modifications of the Board's order to reflect that event, are matters for the court of appeals to consider in the first instance, if this Court grants the petition and reverses the court of appeals' holding that respondent's failure to bargain did not violate the Act.

* Arnold Ordman, General Counsel of the National Labor Relations Board, has disqualified himself because he was the Trial Examiner who conducted the hearing in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,171

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

ADAMS DAIRY, INC., RESPONDENT

On Petition to Enforce Order of National Labor Relations Board

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[September 8, 1965]

Before VOGEL, VAN OOSTERHOUT and RIDGE, Circuit Judges.

VOGEL, Circuit Judge.

On September 12, 1963, this court, on a petition from the National Labor Relations Board, denied enforcement of the Board's order in all respects save one. *National Labor Relations Board* v. *Adams Dairy, Inc.*, 8 Cir., 1963, 322 F.2d 553. The Board petitioned the Supreme Court for certiorari and on January 18, 1965, such petition was granted. Thereafter, by per curiam order, 379 U.S. 644, the prior judgment of this court was vacated and the case was remanded to us "for reconsideration in light of *Fibreboard Paper Products Corp.* v. *Labor Board*", 379

U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233, decided by the Supreme Court subsequent to our opinion in *Adams Dairy*.

Upon remand, we directed that additional briefs be submitted and the case be reargued. That has been done. In our prior opinion, at page 562 of 322 F.2d, we said:

> "We hold here that the decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent contractors was not a required subject of collective bargaining."

After consideration of the additional briefs filed by the parties, the oral arguments of counsel, and viewing this situation in the light of *Fibreboard*, as directed, we believe our original opinion to have been correct. We conclude that *Adams Dairy* is so factually distinguishable from *Fibreboard* as to take *Adams Dairy* outside the orbit of the *Fibreboard* holdings.

Fibreboard arose out of a dispute between the Fibreboard Paper Products Company and a union representing that company's maintenance employees. In September of 1958 the union and company had entered into the latest of a series of collective bargaining agreements which was to expire on July 31, 1959, upon 60 days' notice by either the union or the company. The union gave timely notice. The company delayed meeting with the union until July 27, 1959, at which time the union was informed that Fibreboard intended to "let out" the maintenance work to an independent contractor to save on costs. By July 30th the contractor had been secured on the basis of costs of the operation plus a fixed fee of $2,250 per month. The union was told that in view of the hiring of the contractor, a new agreement negotiation session

would be futile and none was had. Fibreboard was charged with violations under §§ 8(a) (1), 8(a) (3) and 8(a) (5) of the National Labor Relations Act and a violation was upheld under § 8(a) (5).[1] The facts in the *Adams Dairy* case are fully and adequately set out in our prior opinion. At this point it is only necessary to say that Adams Dairy was not found by this court to be in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act by neglecting to bargain with the employees' certified union bargaining representative, the Independent Wholesale Dairy Products Salesmen Association, when discharging their driver-salesmen and replacing them with independent contractors.

As a preliminary matter to the further comparison of these two cases, we point out that the Supreme Court, in *Fibreboard*, carefully limited its decision to the facts presented in that case. At page 209 of 379 U.S., Mr. Chief Justice Warren, who wrote the majority opinion, stated:

> "* * * We agree with the Court of Appeals that, *on the facts of this case*, the 'contracting out' of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively." (Emphasis supplied.)

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[1] Under this section, "It shall be an unfair labor practice for an employer—* * * (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [of this Act]." Under § 9(a) collective bargaining is required as to "* * * rates of pay, wages, hours of employment, or other conditions of employment * * *."

At page 215 of 379 U.S., the opinion continues:

> "We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). *Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.*" (Emphasis supplied.)

In footnote No. 8 on page 215 of 379 U.S., the court states:

> "As the Solicitor General points out, the terms 'contracting out' and 'subcontracting' have no precise meaning. They are used to describe a variety of business arrangements altogether different from that involved in this case. For a discussion of the various types of 'contracting out' or 'subcontracting' arrangements, see Brief for Respondent, pp. 13-17; Brief for Electronic Industries Association as *amicus curiae*, pp. 5-10."

In a separately concurring opinon, joined in by Mr. Justice Douglas and Mr. Justice Harlan, Mr. Justice Stewart pointed out at page 218 of 379 U.S.:

> "* * * The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase 'terms and conditions of employment'. That is all the Court decides. *The Court most assuredly does not decide that every managerial*

decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving 'the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment' is subject to the duty to bargain collectively. Within the narrow limitations implicit in the specific facts of this case, I agree with the Court's decision." (Emphasis supplied.)

Thus the Supreme Court has not held that all forms of contracting out are subject to collective bargaining. For reasons set out below, we believe that the situation in *Adams Dairy* is so factually distinguishable from that in *Fibreboard* as to take *Adams Dairy* outside of the scope of the collective bargaining requirements.

Turning now to the cases themselves, we note, first, that the decision to contract out the maintenance work in *Fibreboard* did not change the basic operation of the company involved. The maintenance work was let out under a terminable contract on a cost-plus basis. The contractor performed the same work previously performed by company employees on company premises with company machines and equipment. The contractor was under the direct control of the company. The company directly enjoyed the benefits of the contractor's work. As stated by the Supreme Court in *Fibreboard*, at page 213 of 379 U.S.:

"The facts of the present case illustrate the propriety of submitting the dispute to collective

negotiation. *The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment.* Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." (Emphasis supplied.)

The separately concurring opinion states at page 219 of 379 U.S.:

> "* * * Maintenance work continued to be performed within the plant, with the work ultimately supervised by the company's officials and 'functioning as an integral part' of the company. Fluor was paid the cost of operations plus $2,250 monthly. The savings in costs anticipated from the arrangement derived largely from the elimination of fringe benefits, adjustments in work scheduling, enforcement of stricter work quotas, and close supervision of the new personnel. Under the cost-plus arrangement, Fibreboard remained responsible for whatever maintenance costs were actually incurred. * * *"

In *Adams Dairy*, on the other hand, a basic operational change did take place when the dairy decided to completely change its existing distribution system by selling its products to independent contractors. After the decision was made by the dairy to sell its products dockside to independent distributors, all of the trucks used previously by driver-salesmen were sold to independent distributors. Adams Dairy did not finance

the sale, nor in any way arrange for such financing. The routes driven by the independent distributors, though covering a similar territory, did not correspond to the previous routes of the driver-salesmen. The independent distributors took title to the products at dockside and Adams, thereafter, legally had no concern with what was done with the products. The distributors were solely responsible for selling the products. The work done by the independent contractors, contrary to the situation in *Fibreboard*, was not primarily performed in the Adams plant for the benefit of the dairy. Adams was not directly concerned with whether or not any given distributor sustained a profit or loss, as would have been the situation with the driver-salesmen. The only major restrictions that Adams placed upon the independent distributors by contract related to sanitation matters and to the maintenance of high products standards and the maintenance of good will.

Contrary to the situation in *Fibreboard*, then, there is more involved in *Adams Dairy* than just the substitution of one set of employees for another. In *Adams Dairy* there is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in *Fibreboard*, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. To require Adams to bargain about its decision to close out the distribution end of its business would significantly abridge its freedom to manage its own affairs. Bargaining is not contemplated in this area under the history and usage of § 8(a)(5). *N. L. R. B.* v. *Neiderman*, 2 Cir., 1964, 334 F.2d 601; *Jays Foods, Inc.* v. *N. L. R. B.*, 7 Cir., 1961, 292 F.2d 317; *N. L. R. B.* v. *R. C. Mahon Co.*, 6 Cir.,

1959, 269 F.2d 44. It was specifically found that there was no anti-union animus present in *Adams Dairy*. In the exercise of what it considered to be good judgment, Adams decided to cease its distribution business and to sell its products to independent distributors. There is no comparability between *Fibreboard* and *Adams Dairy* in this area and the Supreme Court could not say of the *Adams Dairy* situation what it said in *Fibreboard* at page 213 of 379 U.S.:

> "* * * Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business."

Since the Supreme Court's decision in *Fibreboard*, it has handed down a more recent opinion in *Textile Workers* v. *Darlington Mfg. Co.*, March 29, 1965, 380 U.S. 263, which we believe lends support for our contentions here on reconsideration. Therein a majority of the stock of Darlington Manufacturing Company was owned by Deering Milliken & Company, a marketing corporation which the National Labor Relations Board found was controlled by Roger Milliken, Darlington's president, and members of his family. Darlington was part of a single, integrated employer group controlled by the Milliken family through Deering Milliken. This group operated 17 textile companies with 27 mills. An organizational campaign by the union in Darlington was successful, although strongly resisted by Darlington through such methods as threatening to close the mill. Thereafter the Darlington company was liquidated, the plant closed and the equipment sold. The Board found that the closing was due to Roger Milliken's anti-union animus, a violation of § 8(a) (3) of the National Labor Relations Act, and, alternatively, that since the com-

pany was part of a single, integrated employer group, that Deering Milliken Company could be held liable for Darlington's unfair labor practice in closing part of its business for discriminatory purposes. The Court of Appeals had held, 325 F.2d 682, that even assuming Deering Milliken was a single employer, it had the right to terminate all or part of its business regardless of anti-union motives and by a split decision denied enforcement of the Board's order. On appeal, the Supreme Court said at pages 273-276 of 380 U.S.:

> "* * * We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice.
>
> * * * *
>
> "* * * On the other hand, a discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees of much the same kind as that found to exist in the 'runaway shop' and 'temporary closing' cases. See *supra*, p. 272. Moreover, a possible remedy open to the Board in such a case, like the remedies available in the 'runaway shop' and 'temporary closing' cases, is to order reinstatement of the discharged employees in the other parts of the business. No such remedy is available when an entire business has been terminated. By analogy to those cases involving a continuing enterprise *we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining*

plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect. (Emphasis supplied.)

"While we have spoken in terms of a 'partial closing' in the context of the Board's finding that Darlington was part of a larger single enterprise controlled by the Milliken family, we do not mean to suggest that an organizational integration of plants or corporations is a necessary prerequisite to the establishment of such a violation of § 8(a)(3). If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out."

The court there reversed with instructions to remand the case to the Board for further proceedings with respect to employees of other plants owned by the same persons or connected with Darlington. We have no such situation in this case. Primarily, no union animus was shown. Accordingly, this being only a partial closing, unstimulated by union animus, having its motivation based solely in economics of operation, and not being a substitution of one set of employees for

another but an entire and independent operation, we reaffirm our statements made in the original *Adams Dairy* case.

Even if the partial liquidation of Adams involved herein could be held subject to collective bargaining, it is arguable that such bargaining actually took place, which was certainly not the situation in *Fibreboard*. This argument is borne out through a further comparison of some of the factual difference between *Adams Dairy* and *Fibreboard*.

It should first be noted that the decision by Adams to liquidate its distribution system and to sell to independent contractors came at a time when the labor-management contract in force still had two years to run. The contract had become effective on September 1, 1959, and was not to expire until September 1, 1962. The alleged unfair labor practice arose in February of 1960. Thus just because the issue of independent distributors had not been negotiated in February of 1960 does not mean that the issue had not been negotiated before the current contract had been entered into. The facts yield the implication that, in fact, such negotiation had taken place. This being so, we feel that Adams would not be required to reopen negotiations during the contract period. In *Fibreboard*, on the other hand, the unfair labor practice charge arose during negotiations for a new labor-management contract and thus there was little or no excuse for not negotiating the disputed issue during current bargaining sessions. In *Fibreboard*, the Court of Appeals for the District of Columbia, *Fibreboard Paper Products Co.* v. *N. L. R. B.*, U.S. App. D.C., 1963, 322 F.2d 411, said at page 412:

> "*During the period when the Union was seeking to negotiate a new contract*, the Company

was considering contracting out its maintenance work to an independent contractor. By July 27, four days before the end of the contract term and approximately two months after the Union's notice, the Company had decided to contract out all its maintenance work then being performed by 73 men." (Emphasis supplied.)

The 1959 contract in *Adams Dairy* was the third one between the parties since 1954, the other two having expired. During the negotiations for all three of these contracts the union attempted, unsuccessfully, to include a clause which would have prevented Adams from, in effect, selling employees' routes or parts thereof to independent contractors or which would require Adams to reimburse the driver-salesmen for commissions lost through dockside sales of products used or distributed in their territories. During negotiations for the last contract in July and August of 1959 Adams expressed concern over the fact that rival milk companies had lower delivery costs and were able to undersell Adams. The union again orally proposed the inclusion of a clause in the contract prohibiting further substitution of independent contractors on company routes serviced by them. This proposal was again rejected by Adams. The contract was executed on August 24, 1959, without the union obtaining the desired clause.

During November and December 1959, after implementation of the last contract, Adams initiated a series of meetings with the union for the purpose of discussing the unfavorable competitive situation it found itself in due to lower delivery costs of other dairies. Adams asked the union for recommendations that it might have with regard to lowering delivery costs. The union expressed an interest in cooperating

but claimed an inability to help because Adams did not make any specific requests, even though during negotiations for the 1959 contract Adams had attempted, unsuccessfully, to reduce its delivery costs by reducing the commission rate of the driver-salesmen. Adams claims that it asked the union to come up with a plan, and that the latter never complied with this request. The union did meet for the purpose of voting on a motion to reopen the contract for negotiations, but the motion was unanimously rejected.

The present contract discussions and the November-December meetings would certainly come under the heading of negotiation and consultation and these negotiations were arguably "bargaining" as required under § 9(a), even though the union did not get what it desired. As stated by the Supreme Court in *N. L. R. B.* v. *Insurance Agents' International Union, AFL-CIO*, 1960, 361 U.S. 477, 485-486:

> "* * * Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract. See *Heinz Co.* v. *Labor Board*, 311 U.S. 514. This was the sort of recognition that Congress, in the Wagner Act, wanted extended to labor unions; recognition as the bargaining agent of the employees in a process that looked to the ordering of the parties' industrial relationship through the formation of a contract. See *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295.
>
> "But at the same time, Congress was generally not concerned with the substantive terms on

> which the parties contracted. Cf. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6."

There is no evidence that collective bargaining, as traditionally understood, did not take place on the matters in dispute in this case.

The Board argues:

> "* * * Moreover, at no time in the negotiations did the Company suggest that it contemplated changing its method of distribution so as to replace all its driver-salesmen with independent distributors; * * *."

Even accepting this contention, it appears clear to us if Adams Dairy had ever stated to the union during negotiations that unless the company received a reduction in the wages of driver-salesmen it would eliminate all drivers by selling the distribution business to independent contractors, that this might well constitute coercive behavior. In *Textile Workers* v. *Darlington Mfg. Co.*, 1965, 380 U.S. 263, *supra*, the Supreme Court said at footnote No. 20 on page 274 of 380 U.S.:

> "Nothing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision. * * *"

However, at all times Adams did make it clear to the union that the company regarded the terms of the contracts excessive. In light of the fact that some subcontracting had already been done (there were 10 independent contractors buying their dairy products

dockside and 24 driver-salesmen at the time Adams entirely terminated the distribution end of its business), the union must have recognized that an entire system of independent contractors was a possible alternative. In fact, it is significant that the 1959 contract itself provided the procedures to be taken in the event route or routes were to be discontinued or eliminated. The agreement provided:

> "Nothing herein contained in this Article VII *shall prevent Employer from* enlarging, decreasing or altering the specified territory of any route nor shall the same prevent Employer from putting on, splitting, rearranging, consolidating or *eliminating any route or routes* provided (1) Employer complies with the provisions of Article XII of this Agreement, and (2) provided Employer specifies within seven (7) days thereafter a specific route territory for each of Employer's established milk routes so affected." (Emphasis supplied.)

Although proviso No. 2 could not possibly have any meaning in connection with the total elimination of all the routes, it was still imperative for the employer to comply with the first proviso. Article XII provides that:

> "Employer agrees not to consolidate or take off a route that is in commission on the points set forth under 'Method for Determining Points' unless a four (4) month guarantee of the employee's basic pay and commission is paid. However, the four (4) month guarantee provided by this Article shall terminate: (1) on the date a driver receiving a guarantee is awarded another job on a bid filed by him under the provisions of Article XIII; (2) on the date his employment as a regu-

lar route driver is changed; and (3) on the date driver's employment is terminated unless employee was discharged without cause."

Thus merely by the fact provision was made for the termination of a route should have, and probably did, put the union on notice that rising costs might force Adams to replace all driver-salesmen with independent contractors.

We reenter the same orders that followed our original determination of this case. In reaffirming our prior order relating to severance pay, we think it not remiss to point out that the penalties fixed by the Board for what it concluded to be a violation of §§ 8 (a) (5) (1) were entirely too broad, excessive and unrealistic. We are told by counsel that Adams completely terminated all of its activities as of December 30, 1963, and that penalties up to that date under the Board's original order amounted to over three-quarters of a million dollars. If such remedies could continue up to the present time and until this litigation is finally and ultimately disposed of, the Board's penalties would become even more confiscatory and unjust.

A true copy.

Attest: [Illegible]

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Decree of U. S. Court of Appeals after remand of case by Supreme Court, U. S.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,171. September Term, 1964

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

ADAMS DAIRY, INC., RESPONDENT

On Petition to enforce Order of National Labor Relations Board

This cause came on for reargument before this Court on May 8th, 1965, on the Petition to review the Order of the National Labor Relations Board entered June 25, 1962, directed against the Respondent, Adams Dairy, Inc., its officers, agents, successors and assigns, and the record and briefs filed by counsel for the respective parties, after remand of the case by the Supreme Court of the United States for consideration by this Court in light of the decision of the Supreme Court in Fibreboard Paper Products Corporation v. National Labor Relations Board, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233.

Wherefore, in conformity with the Opinion of this Court heretofore filed September 12, 1963, granting the Order of the Labor Board in one respect with modification, and denying enforcement of the Order of the Board in all other respects, and the Opinion of this Court on reargument filed this day,

It is now here Ordered, Adjudged and Decreed by this Court that the Respondent, Adams Dairy Inc., shall pay each of the affected employees the four

months guaranteed basic pay and commission as provided for in the collective bargaining agreement between Adams Dairy, Inc., and the Independent Wholesale Dairy Products Salesmen's Association, dated September 1, 1959, less the one week's pay already distributed, plus the interest on the additional amounts due at the rate of six percent per annum to April 16, 1964, pursuant to Order of this Court of May 18th 1964.

September 8, 1965.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination

or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and

conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * *

Sec. 10 * * *

* * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

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